

***United States Court of Appeals
for the Second Circuit***



MEMORANDUM

B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- x

WALTER WAX and LAWRENCE LEVINE, :

Petitioners, :

-against- :

HONORABLE CONSTANCE BAKER MOTLEY, :

UNITED STATES DISTRICT JUDGE, :

Respondent. :

----- x

UNITED STATES OF AMERICA, :

-against- : 74 Cr 573 (CBM)

NORMAN RUBINSON, et al., :

Defendants. :

----- x

MEMORANDUM OF LAW
IN SUPPORT OF PETITION
FOR WRITS OF MANDAMUS
AND PROHIBITION

Petitioners Wax & Levine
SHEA GOULD CLIMENKO KRAMER & CASEY
ATTORNEYS FOR
330 MADISON AVENUE
NEW YORK, N. Y. 10017
212 661-3200

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
WALTER WAX and LAWRENCE LEVINE,

Petitioners,

-v-

HONORABLE CONSTANCE BAKER MOTLEY,
UNITED STATES DISTRICT JUDGE,

Respondent.

-----x
UNITED STATES OF AMERICA,

-v-

NORMAN RUBINSON, et al.,

Defendants.

-----x

PRELIMINARY STATEMENT

This Memorandum of Law is submitted in behalf of
Petitioners Walter Wax and Lawrence Levine in support of their
application for Writs of Prohibition and Mandamus pursuant to
Rule 21, Federal Rules of Appellate Procedure, and the All
Writs Act, 28 U.S.C., §1651. Inasmuch as the affidavit in
support of the petition sets forth the pertinent facts they will
not be here restated.

Petitioners assert in substance that the indictment by which they stand charged is void by reason of the fact that the grand jury which returned it was originally impanelled pursuant to Rule 6, Federal Rules of Criminal Procedure, and was improperly extended as though it were a "Special" grand jury within the meaning of 18, U.S.C. §3331. The subject indictment was returned by the grand jury after its 18 month term expired and during the period on one of its improper extensions. A motion addressed to this point seeking dismissal of this indictment was made in the District Court and summarily denied by Honorable Constance Baker Motley, without opinion on January 10, 1975. The instant application is made to the United States Court of Appeals because petitioners believe the indictment to be a nullity and the District Court has scheduled the indictment for trial to commence on or about January 16, 1975.

POINT I

MANDAMUS AND PROHIBITION
ARE APPROPRIATE FORMS OF
RELIEF

It is petitioners' position that the indictment by which they stand charged is jurisdictionally void in that it was returned by a grand jury originally impanelled pursuant to Rule 6, Federal Rules of Criminal Procedure, but improperly extended beyond its term which must as a matter of law terminate 18 months after it is convened (Rule 6(g), Federal Rules of Criminal Procedure). Grand juries impanelled under this rule can not be extended beyond the statutorily prescribed 18 month term. United States of America v. Fein, _____ Fed. 2d. _____ Docket No. 74-1446 (2nd Cir., October 15, 1974).

The situation thus presented is similar to the facts in Hilbert v. Dooling, 476 F. 2d. 355 (1973). In Hilbert this Court ruled that the indictment was invalid, that the District Court should have dismissed it, and that mandamus was an appropriate remedy prior to trial of the indictment. We contend that the instant indictment is invalid, that it should have been dismissed in the District Court and that mandamus should issue at this time so as to avoid the necessity of a lengthy trial of at least 6 weeks duration. Fundamental principles of due process and fairness dictate that these petitioners not be forced

to trial upon the invalid indictment and be relegated to an appellate remedy should they be convicted. Likewise it makes little sense for the government and the Court to waste their valuable time and resources pursuing the prosecution and trial of an invalid indictment.

Petitioners are aware of no other remedy save mandamus and prohibition. Petitioners seek not a piecemeal review of the District Court's pretrial decisions, but request this Court to exercise its "supervisory control" over District Courts in the exceptional circumstances provided by this case. LaBuy v. Howes Leather Co., 352 U.S. 249 (1957). See also Dubnoff v. Goldstein 385 F. 2d. 717, 722 (2nd Cir., 1967). Petitioners further urge that the facts of this case present "novel and important" questions of law within the meaning of Schlagenhauf v. Holder, 379 U.S. 104 (1964). The importance of the questions is self-evident; they are novel because the case arises out of the Organized Crime Control Act of 1970 (18 U.S.C., §3331 et seq.) as it relates to the theretofore nonexistent creature known as a "Special Grand Jury". There seems to be no judicial authority save Fein, supra, interpreting the act as it relates to grand jury procedure and of course it is the very loose interpretation of that act by the government which necessitated the instant petition.

For all of the foregoing reasons we respectfully

submit that the extraordinary Writs of Mandamus and Prohibition are appropriate in this case and ought to issue in the interest of justice.

POINT II

THE "ADDITIONAL" GRAND JURY
IMPANELLED ON APRIL 18, 1972
WAS A GRAND JURY IMPANELLED PUR-
SUANT TO RULE 6 OF FEDERAL RULES
OF CRIMINAL PROCEDURE AND AS
SUCH COULD NOT HAVE BEEN EXTENDED

A grand jury is a creature of statute and as such the creation and term thereof must be governed by relevant rules and/or statutory enactments. United States of America v. Fein, ___ F. 2d. ___, Docket No. 74-1446 (2nd Cir., October 15, 1974). Petitioners assert that the April 18, 1972 Grand Jury was impanelled as an "additional" Grand Jury impanelled pursuant to Rule 6, F.R. Crim. P., and as such was strictly governed by that statute.

Nothing could be found in either the Certificate of the United States Attorney, or the Order dated March 17, 1972 which directed the impanelling of the subject grand jury, to indicate that said jury was to be a Special Grand Jury. The Certificate and Order are conspicuously silent with respect to any of the language set forth in 18 U.S.C. § 3331, et seq. (the Organized Crime Control Act of 1970) relating to Special Grand Juries. The statute reads in part:

In addition to such other grand juries as shall be called from time to time, each district court. . . shall order a special grand jury to be summoned at least once in each period of eighteen months unless another special grand jury is then serving."
[Emphasis added].

The United States Attorney for the Southern District of New York requested in his Certificate to the Court that an "additional" Grand Jury be impanelled because the "volume of work in criminal cases is such that the exigencies of public service require an additional Grand Jury." There is no language in the Certificate indicating that a Special Grand Jury was being requested. This is not a mere exercise in semantics, for the issue goes to the very foundation of our Federal grand jury system as pointed out in the Fein case, Supra, one of the principle functions of the grand jury is that it stand as a safeguard against the possible excesses of over-zealous prosecutors. To effect this goal Congress provided in Rule 6, F.R.Crim.P., that the maximum term of any grand jury be 18 months, and in specifically limiting the period of time during which grand jurors can serve, Congress lessened the possibility that jurors would come to identify with the prosecution and view themselves as an added arm of law enforcement, rather than protectors of the rights of the citizenry. The government apparently believes that Rule 6 has been abrogated by Title 18, U.S.C §3331 (the Organized Crime Control Act of 1970) for it views this latter section as giving it the power to circumvent Rule 6 and extend the term of any grand jury which it desires for whatever reason to be a "Special" Grand Jury, within the meaning of §3331.

Provisions for the impanelling of additional grand juries are specifically set forth in Rule 6, F.R.Crim.P., which states "[t]he court shall order one or more grand juries to be summoned a such times as the public interest requires." It is manifest on the face of the United States Attorney's Certificate of March 17, 1972 that a Rule 6 grand jury was sought. We believe that it is the standard form certificate used to request ordinary grand juries and additional grand juries under Rule 6, and it makes no mention of the now alleged contention that the jury's purpose was to effect the special and limited purposes of the Organized Crime Control Act. To the contrary, the certificate refers to the "volume of work in criminal cases", "the exigencies of the public service," and "an additional Grand Jury". There is no mention of 18 U.S.C. §3331, or a "Special Grand Jury."

Mention is made in the legislative history of 18 U.S.C. §3331, U.S. Code and Admin. News, 91st Cong. Second Session (1970) p. 4007 that the purpose* of the Act is "in accord with a recommendation of the President's Commission on Law Enforcement and Administration of Justice". In the report, The Challenge of Crime in a Free Society ("Challenge"), p. 200 the Commission emphasized the problem that "law

*The purpose of the Act is "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." [Emphasis added].

enforcement agencies meet in trying to prove the participation of organized crime family members in criminal acts." It was noted that "[a] compulsory process is necessary to obtain essential testimony or material." The Commission then recommended:

At least one investigative grand jury should be impanelled annually in each jurisdiction that has major organized crime activity.

It was with this recommendation in mind that Congress enacted the portion of the Act relating to Special Grand Juries.

Going back to the March 17, 1972 Certificate of the United States Attorney requesting the impanelling of an "additional" Grand Jury, the conclusion is inescapable that the Grand Jury was to be an "additional" Grand Jury pursuant to Rule 6 and not a "Special" Grand Jury pursuant to 18 U.S.C. §3331 et seq. The Organized Crime Control Act of 1970 was not enacted to allow prosecutors to circumvent the Federal Rules of Criminal Procedure. The purpose was to supplement the rules in order to give the government a new and different weapon in fighting organized crime. The Act did not give some prosecutors carte blanche privilege to convene grand juries at will and thereafter extend them for extraordinarily long periods of time in contravention of Rule 6. If this were the intent of the Act, no grand jury would have to be convened

pursuant to Rule 6 in some districts while other districts would have to rely solely on Rule 6. "Such a result could produce unequal results across the country." United States v. Fein. Rule 6, F.R.Crim. P. is very liberal in allowing "additional" grand juries to be convened. There is no reason, therefore, to go to 18 U.S.C. §3331 to get around nonexistent barriers unless the government wishes to keep "seasoned" grand jurors on hand to hear its ordinary "volume of work in criminal cases."

It would appear that the practice in the Southern District of New York is to label all grand juries "additional". The government, if left by this Court to its own designs, could by merely claiming in the papers requesting an extension that any "additional" grand jury was a "Special Grand Jury," and extend the term of all grand juries. It is believed that there were at least nine (9) other "additional" Grand Juries convened during the term and extension of the April 18, 1972 Grand Jury. This is not the situation that Congress intended to create by §3331, F.R.Crim.P.

The evidence, so far as it can be uncovered, indicates that an "additional" Grand Jury is a regular Rule 6, F.R.Crim.P., grand jury. Since the amendment in 1966, grand juries impaneled pursuant to Rule 6 after the first grand jury of a given term have been classically denominated "additional" grand juries. United States v. Wallace & Tiernan, Inc. 234 F. Supp. 780 (Dis.

Ct., D.C., 1964). The language used in Rule 6(a) and the language used by the then United States Attorney in his Certificate dated March 17, 1972 are almost identical. Rule 6 states that "the court shall order one or more grand juries to be summoned at such times as the public interest requires," (emphasis added).. The Certificate notes that "the exigencies of the public service require an additional Grand Jury," (emphasis added).

The Certificate and the Order overwhelmingly show that the April 18, 1972 Grand Jury was an additional Grand Jury convened pursuant to Rule 6(a). The law is well settled in this Circuit that a Grand Jury convened pursuant to Rule 6(a) cannot be extended by court order; United States v. Fein, supra. Therefore, any indictment returned by a Grand Jury improperly extended pursuant to court order is invalid (United States v. Fein).

The government argued in the District Court that it did not specify in its original Certificate of March 17, 1972 that the grand jury to be impanelled was a Special Grand Jury pursuant to 18 U.S.C. §3331 because of the secrecy of grand jury matters. It must be pointed out, however, that in all the Certificates with respect to an extension of the subject grand jury, and the Orders attendant thereto, language is specifically used to give an indication that the grand jury was then considered Special Grand Jury impanelled

pursuant to 18 U.S.C. § 3331(a). It is clear that if the April 18, 1972 Grand Jury was supposed to have been a Special Grand Jury as argued by the government, some indication with respect thereto, as in the extension certificates and orders, should have been given in the Certificate or Order dated March 17, 1972. We are astounded that the government had the gall to come into open court and utter this argument.

The government may further argue that the granting of relief in this motion would virtually open the door to the dismissal of thousands of indictments. However, as this Court stated in United States v. Fein:

We are, of course, fully cognizant of the fact that our decision here constitutes much more than an academic discussion and that other indictments will be dismissed on the basis of this opinion. It may well be that criminal proceedings which would be in the public interest will be frustrated and that those who might be found guilty will escape trial and conviction. However, it is fundamental to our jurisprudence that the rule of law must prevail and that the prosecution of those suspected of crime must itself proceed according to the law, and not otherwise.

The government may also raise the issue that failure to specifically label the grand jury as a Special Grand Jury in the Certificate and Order and continuing it beyond the 18 month period is a technical irregularity and is not fatal to the indictment herein. In this case as in Fein, such a defect "goes to the very existence of the grand jury itself and is not one which can be properly characterized as merely 'formal

Ch., D.C., 1964). The language used in Rule 6(a) and the language used by the then United States Attorney in his Certificate dated March 17, 1972 are almost identical. Rule 6 states that "the court shall order one or more grand juries to be summoned at such times as the public interest requires," (emphasis added).. The Certificate notes that "the exigencies of the public service require an additional Grand Jury," (emphasis added).

The Certificate and the Order overwhelmingly show that the April 18, 1972 Grand Jury was an additional Grand Jury convened pursuant to Rule 6(a). The law is well settled in this Circuit that a Grand Jury convened pursuant to Rule 6(a) cannot be extended by court order; United States v. Fein, supra. Therefore, any indictment returned by a Grand Jury improperly extended pursuant to court order is invalid (United States v. Fein).

The government argued in the District Court that it did not specify in its original Certificate of March 17, 1972 that the grand jury to be impanelled was a Special Grand Jury pursuant to 18 U.S.C. §3331 because of the secrecy of grand jury matters. It must be pointed out, however, that in all the Certificates with respect to an extension of the subject grand jury, and the Orders attendant thereto, language is specifically used to give an indication that the grand jury was then considered Special Grand Jury impanelled

pursuant to 18 U.S.C. § 3331(a). It is clear that if the April 18, 1972 Grand Jury was supposed to have been a Special Grand Jury as argued by the government, some indication with respect thereto, as in the extension certificates and orders, should have been given in the Certificate or Order dated March 17, 1972. We are astounded that the government had the gall to come into open court and utter this argument.

The government may further argue that the granting of relief in this motion would virtually open the door to the dismissal of thousands of indictments. However, as this Court stated in United States v. Fein:

We are, of course, fully cognizant of the fact that our decision here constitutes much more than an academic discussion and that other indictments will be dismissed on the basis of this opinion. It may well be that criminal proceedings which would be in the public interest will be frustrated and that those who might be found guilty will escape trial and conviction. However, it is fundamental to our jurisprudence that the rule of law must prevail and that the prosecution of those suspected of crime must itself proceed according to the law, and not otherwise.

The government may also raise the issue that failure to specifically label the grand jury as a Special Grand Jury in the Certificate and Order and continuing it beyond the 18 month period is a technical irregularity and is not fatal to the indictment herein. In this case as in Fein, such a defect "goes to the very existence of the grand jury itself and is not one which can be properly characterized as merely 'formal

or accidental." An example of a technical irregularity may be found in the Certificate signed by United States Attorney, Paul J. Curran, dated October 3, 1973. In this Certificate he erroneously labeled the grand jury as the Special Grand Jury "impanelled on April 18, 1973" (emphasis added) when the year should have been 1972.

It is, therefore, submitted that the April 18, 1972 Grand Jury was a grand jury impanelled pursuant to Rule 6(a) F.R.Crim. P. and not a grand jury impanelled pursuant to 18 U.S.C. §3331(a); and as such could not have been, as a matter of law, extended past the 18 month period as set forth in subdivision (g) of Rule 6.

POINT III

THE GOVERNMENT MAY NOT SHOW
BY PAROL OR EXTRINSIC EVIDENCE
THAT THE ORDER ORIGINALLY IMPAN-
ELLING THE APRIL 18, 1972 GRAND
JURY HAS MEANING OTHER THAN THAT
WHICH IS CLEAR AND UNAMBIGUOUS ON
ITS FACE.

Petitioners contend that all orders impanelling grand juries in the Southern District of New York pursuant to Rule 6, Federal Rules of Criminal Procedure, since 1966 when that rule was amended, have used language identical to the language which appears in the order impanelling the April 18, 1972 grand jury. That is to say, each grand jury after the first grand jury in any given term is specifically referred to in the impanelling order as "an additional grand jury". In opposition to petitioners' motion to dismiss in the District Court the government submitted affidavits of certain parties involved in the impanelling of the subject grand jury so as to show that these parties intended or wished that a "Special" grand jury within the meaning of 18, U.S.C., §3331 be impanelled. The government even submitted the affidavit of Honorable David N. Edelstein, Chief Judge of the United States Court for the Southern District of New York, for this purpose as well. Copies of these affidavits are annexed to the petition collectively as Exhibit "C".

Petitioners take the position that the order impanelling the April 18, 1972 Grand Jury is clear and unambiguous on its face and that the Court may not go beyond that order to consider parol and extrinsic evidence so as to read meaning into it.

As the Court held in Manson v. United States, 169 F. Supp. 507 (U.S. Ct. of Claims, 1959) at p.510, "[I]t is well settled that parol or extrinsic evidence is inadmissible in a collateral proceeding to vary or contradict judicial records, orders or decrees. Hill v. United States ex rel. Wampler, 1936, 298 U.S. 460, 56 S.Ct. 760, 80 L.Ed. 1283; In Re Union League Club of Chicago, 7 Cir., 1953, 203 F.2d. 381; In re Crosby Stores 2 Cir., 1933, 65 F. 2d. 360."

Petitioners contend that the holding in Gila Valley Irrigation District v. United States, 118 F. 2d. 507 (9 Cir., 1941), clearly is in point. There the Court held that decree of a lower Court was not so ambiguous as to justify or require extrinsic evidence to explain its meaning. The Court went on to say that "[W]e are concerned not with the intention of the parties as in the case of a contract between them, but with the intention of the Court as expressed in the decree." [Emphasis added]. In Gila the Court further observed that in the event of an ambiguity the pleading should be consulted. Although there are no pleadings per say in this case the certificate of the United States Attorney requesting that a grand jury be impanelled on April 18, 1972 would be an analogous document and might properly be considered in an inquiry into the meaning of an impanelling order. That certificate, Exhibit "E" to the petition, requested an "additional grand jury" be impanelled, and makes no mention of the now alleged desire that a "Special" grand jury be impanelled pursuant to Title 18, U.S.C. §3331. In obtaining extensions of that grand jury the United States Attorney in his

certificates specifically used the words "Special Grand Jury" and referred to the said statutory authorization. The fact that the certificate and initial impanelling order employed the language previously used to impanel all Rule 6 regular grand juries and the extension certificate and orders employed other language make it clear that the government was, in April, 1972, following the practice which it admitted and said was valid in the Fein case, supra. It must not now be permitted to come before the Court with extrinsic evidence to show the certificate and order have meaning different from the clear language which appears on the face of the documents.

POINT IV

A GRAND JURY CONVENED PURSUANT
TO RULE 6(a) CANNOT BE CONVERTED
TO A SPECIAL GRAND JURY AND THEN
EXTENDED

The grand jury convened April 18, 1972, was a regular additional grand jury pursuant to Rule 6(a) and as such cannot later be converted to a special grand jury and then extended. United States v. Fein, supra.

POINT V

EVEN IF THE "ADDITIONAL"
GRAND JURY CONVENED ON
APRIL 18, 1972 IS FOUND
TO BE A SPECIAL GRAND
JURY, THE GRAND JURY WAS
ILLEGALLY IMPANELLED BE-
CAUSE MORE THAN TWO
SUCH GRAND JURIES WERE
SITTING

The Organized Crime Control Act of 1970 makes it clear that there can be no more than two special grand juries convened at any time in a district. 18 U.S.C. § 3332(b). This section specifies that:

Whenever the district court determines that the volume of business of the special grand jury exceeds the capacity of the grand jury to discharge its obligations, the district court may order an additional special grand jury for that district to be impanelled." (emphasis added)

It is the defendants belief that at the time the April 18, 1972 grand jury was convened there were numerous other "additional" grand juries in being. Said other grand juries were identical to the subject jury, and if extended as special grand juries they too must necessarily be invalid.

CONCLUSION

For the reasons stated above, the petition for Writs of Prohibition and Mandamus should be granted.

Respectfully submitted,

SHEA GOULD CLIMENKO KRAMER & CASEY

Attorneys for Petitioners
Walter Wax and Lawrence Levine
333 Madison Avenue
New York, New York 10017
(212) 661-3200

OF COUNSEL

Thomas A. Andrews
John J. Grimes

STATE OF NEW YORK)

: ss. :

COUNTY OF NEW YORK)

JOYCE BURICH, being duly sworn, deposes and says:
that deponent is in the employ of SHEA GOULD CLIMENKO & KRAMER.
attorneys for Defendants Walter Wax and Lawrence Levine
herein, is over 18 years of age, is not a party to this action
and resides at 116 W. 72nd Street, New York, New York 10023. On
the 15th day of January, 1974, deponent served the
within MEMORANDUM OF LAW

on the following attorneys in the within entitled action

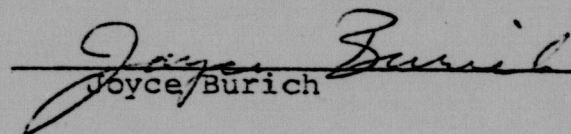
McCoyd & Keegan, Esq.
1000 Franklin Avenue
Garden City, New York

William Chester, Esq.
955 N.E. 80th Street
Miami Florida 33138

Morton Robson, Esq.
450 Park Avenue
New York, New York

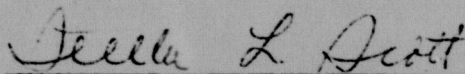
Morton Berger, Esq.
54 Durham Road
White Plains, New York

by depositing a true and correct copy of the same properly
enclosed in a post paid wrapper in the official depository
maintained and exclusively controlled by the United States
Government at 330 Madison Avenue, New York, New York 10017,
that being the post office address of the attorneys for
Defendants Wax and Levine, directed
to said attorney(s) at the addresses designated by them for
that purpose.


Joyce Burich

Sworn to before me

this 15th day of Jan., 1974.



STELLA L. SCOTT
Notary Public, State of New York
No. 24-3369498
Qualified in Kings County
Commission Expires March 29, 1975

Received 1-15-75.
Norman Nelson

Jan 1-15-75

James E. Smith atty J. H. Smith

Copy received

David R. Toner for V. M. Mather

1-15-75

